# OVERVIEW ARIZONA PUBLIC RECORDS LAW

**Prepared for Arizona Charter Schools Association** 

## "UNDISCOVERED HORIZONS IN PUBLIC EDUCATION" CONFERENCE

Terri Skladany Assistant Attorney General

#### THE PUBLIC RECORDS LAW

The Public Records Law, (A.R.S. § 39-121 to 39-161), establishes which documents in the possession of public bodies and their officials are open to public scrutiny and under what circumstances the law mandates disclosure.

#### THE PUBLIC RECORD

There is no definition of what constitutes a "public record" in statute. Nonetheless, A.R.S. § 39-121-01(B) mandates that all public bodies and public officers maintain records reasonably necessary to provide an accurate account of both their official activities and all government funded activities.

To be a public record, however, the record must relate to the official duties of the public officer or public agency. <u>Salt River Pima-Maricopa Indian Community v. Rogers</u>, 161 Ariz. 531 (1991).

The Arizona Supreme Court in Mathews v. Pyle, 75 Ariz. 76, 78-9 (1953) defined a public record as follows:

A "public record," strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference. (Citations omitted.) Also a record is a "public record" which is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law to serve as a memorial and evidence of something written, said or done. (Citations omitted.) It has also been held that a written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not, is admissible as a public record. (Citations omitted.)

#### Examples of Public Records:

- 1. Records of expenditures of public money. Ariz. Att'y. Gen. Op. 70-1;
- 2. Computer backup tapes containing all documents generated by a public agency for a year, including e-mail communications of employees, <u>Star Publishing Co. v. Pima County Attorney's Office</u>, 171 Ariz. Adv. Rep. 48 (App. 1994);
- 3. Annual reports filed by corporations with the Arizona Corporation Commission, State v. Betts, 71 Ariz. 362, 227 P2d 749 (1951); Ariz. Att'y Gen. Op. 61-114-L;

Public Officers and public bodies must comply with the Public Records Law. "'Officer' means any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R-S. § 39-121.01(A)(1). "'Public body' means the state, any county, city, town, school district political subdivision or tax-supported district

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in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization of agency supported in whole or in part by funds from the state by the state or any political subdivision thereof." A.R.S. § 39-121.01(A)(2).

Each public body and officer must preserve, maintain and care for the public records within their offices. A.R.S. § 39-121.01(C). They are required to protect, secure, and preserve public records from deterioration, mutilation, loss or destruction. Id.

# THE PUBLIC RECORDS REQUEST: DISCLOSURE OF PUBLIC RECORDS

A pubic records request should contain:

- 1. The name of the requester,
- 2. A specific description of all documents requested,
- 3. Whether the request is to merely look at the document or to obtain a copy,
- 4. Whether the request is for a commercial or non-commercial purpose,
- 5. If the request is for a commercial purpose, the requester must provide a certified statement explaining the purpose for which the copies will be used. (See attached).

Public agencies are free to prepare a request form listing the above topics but the form must not be used to delay a response to a request.

As stated in the 1993 revision of the Arizona Agency Handbook:

A.R.S. § 39-121 sets forth the general policy of this state with respect to public inspections of governmental records: "Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person." The public records statute seeks to increase public access to government information and to make government agencies accountable to the public by giving the public a right of access to records concerning an official's or a public agency's activities. The public does not have the right to demand access unless the records have a "substantial nexus" to the agency's activities. Salt River Pima-Maricopa Indian Community vs. Rogers, 168 Ariz. 531, 815 P.2d 900 (1991). The public has no right of access to private records that have no relation to the agency's activities even though the records are located in government offices, Id. Generally, however, the custodian of the government records must resolve whether the document requested is a public record and whether any authorized grounds exist for denying public inspection. See Section 6.5.

#### DENYING PUBLIC INSPECTION

Inspection of public records may be denied when:

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- 1. The record is made confidential by statute, <u>Berry v. State</u>, 145 Ariz. 12, 699 P.2d 387 (App. 1985);
- 2. The record involves the privacy interests of persons, <u>Carlson v. Pima County</u>, 141 Ariz. 487, 687, 687 P.2d 1242 (1984); or
- 3. Disclosure would be detrimental to the best interests of the state, <u>Carlson v. Pima</u> County, 141 Ariz. 487, 687 P.2d 1242 (1984).
  - a. <u>Confidential by statute</u>: Public officers should review the Arizona Revised Statutes to determine whether the document requested is made confidential by statute. Two examples of confidential records related to the operation of a charter school are:
    - 1. Evaluations of certified teachers. A.R.S. § 15-537.
    - 2. Minutes of executive session authorized by the Open Meeting Law. A.R.S. § 38-431-03(B).

### b. Records involving privacy interests:

Arizona courts have long recognized personal privacy as an exception to the general rule requiring access to government records. <u>Industrial Comm'n v. Holohan</u>, 97 Ariz. 122, 397 P.2d 624 (1964); <u>Carlson v. Pima County</u>, 141 Ariz. 487, 687 P.2d 1242 (1984); <u>Church of Scientology v. City of Phoenix Police Dep't</u>, 122 Ariz. 338, 594 P.2d 1034 (App. 1979); <u>Mitchell v. Superior Court</u>, 142 Ariz. 332, 690 P.2d 51 (1984). Under this exception, the custodian has discretion to deny public inspection when the disclosure would invade privacy, and that invasion outweighs the public's right to know. <u>See</u> Ariz. Att'y Gen. Ops. 186-090, 185-097, 188-130 (autopsy reports); <u>see also 5 U.S.C.</u> § 552(b)(6), (7)(C).

#### c. Best interests of the State:

As early as 1952, the Arizona Supreme Court adopted an exception to public disclosure for records which would be detrimental to the best interests of the State. Mathews v. Pyle, 75 Ariz. 76 251 P.2d 893(1952). The standard "detrimental to the best interests of the State" authorizes a public body to determine that a record is confidential when the public body will be seriously impaired in the performance of its duties if the information is disclosed. Mathews, 75 Ariz. at 81, 251 P.2d at 896. Public officers must balance the possible adverse impact on the operation of the public body if the requested information is disclosed against the public's right to be informed about the operations of its government.

For example, the Arizona Supreme Court held that the public's interest in having the State secure the most qualified candidate for university President is more compelling than its interest in knowing the names of all of the "prospects" for the position. <u>Board of Regents v. Phoenix Newspapers, Inc.</u>, 167 Ariz. 254, 806 P.2d 348 (1991). When a "prospect" is seriously considered and interviewed, the "prospect" becomes a candidate. The public's interest in knowing which <u>candidates</u> are being considered for the job outweighs

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"countervailing interests of confidentiality and privacy and the best interests of the State." Id. at 258, 806 P.2d at 352.

#### REFUSAL TO DISCLOSE PUBLIC RECORDS

The Arizona Supreme Court recognized that public officers needed to have some discretion to deny access to records. It said:

While access and disclosure is the strong policy of the law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection.

<u>Carlson v. Pima County</u>, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984 (citing <u>Mathews v. Pyle</u>, 75 Ariz. 76, 251, P.2d 893 (1952)); <u>Board of Regents vs. Phoenix Newspapers</u>, <u>Inc.</u>, 167 Ariz. 254, 806 P.2d 348 (1991).

Please Note: If you act arbitrarily, capriciously or in bad faith in denying access to a public record, the court may award legal costs, including attorney's fees, to the requester. A.R-S. § 39-121.01(B). Where there is room for two opinions, denying access is not arbitrary or capricious if the decision is made honestly with due consideration. Phoenix Newspapers, Inc., 167 Ariz. at 259, 806 P.2d at 353 (citing Tucson Public School Dist. No. 2 v. Green, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972)); but see Cox Arizona Publications, Inc. v. Collins, 175 Ariz. 10, 14 (1993) in which the court indicated that failure to produce records for in camera review or to offer a redacted version to a reviewing court and the requesting party may justify a conclusion that a custodian acted arbitrarily or capriciously. If a public body discloses a redacted document it should keep a record of what material was redacted.

### CHARGING FEES FOR COPIES OF PUBLIC RECORDS

- 1. Non-commercial -- A public body may charge a fee for copies, A.R-S. § 39-121-01(D). The public body may charge "any fee it deems appropriate for copying records, including a reasonable fee for the cost of time, equipment and personnel used in producing copies of records subject to public disclosure, but not costs for searching the records." Ariz. Att'y Gen. Op. 186-090.
- 2. Commercial -- Charges for copies for commercial purposes shall include (1) a portion of the cost for obtaining the original or copies of the documents, photographs or printouts, (2) a reasonable fee or the cost of time, equipment and personnel in producing such reproduction, and (3) the value of the reproduction on the commercial market. A.R.S. § 39-121-03(A)(1-3).

Commercial purposes "means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or

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photograph for sale or the obtaining of names and addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of such public record." A.R.S. § 39-121.03(D).

"If the custodian of a public record determines that the commercial purpose stated in the verified statement is a misuse of public records or is an abuse of the right to receive public records, the custodian may apply to the Governor requesting that the Governor by executive order prohibit the furnishing of copies, printouts or photographs." A.R.S. § 39-121.03(B).

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